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IN THE

# Supreme Court of the United States

OCTOBER TERM, A.D. 1962

## No. 988

**FRANK PETZELT,**

*Petitioner.*

vs.

**THEODORE J. MAYER,**

*Respondent.*

**Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit**

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**No.**

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**Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit**

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## OPINION OF THE COURT BELOW.

The Opinion of the United States Court of Appeals for the Seventh Circuit is reported at 311 F. 2d 601. The Opinion appears at page 1a of the appendix to this petition. No Opinion was rendered in the District Court.

## GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

The date of the judgment sought to be reviewed and the time of its entry is December 28, 1962. An order was entered on January 30, 1963 denying a petition for rehearing. The statutory provision conferring jurisdiction on this Court to review the judgment in question by writ of certiorari is 28 U.S.C. Sec. 1254(1).

## QUESTIONS PRESENTED FOR REVIEW.

### QUESTION ONE.

In entering judgment for the defendant notwithstanding the verdict, the District Court did not rule upon defendant's alternative motion for a new trial. Under these circumstances, does the reversal of the judgment by the Circuit Court of Appeals require the remandment of the cause to the District Court to rule upon the undisposed alternative motion for a new trial?

### QUESTION TWO.

A. May the reviewing Court in a jury case reverse a judgment on "evidence" not heard by the jury?

B. May the reviewing Court in a jury case reverse a judgment on "evidence" not heard by the jury, without remanding the cause for a new trial?

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

The pertinent text of the constitutional provisions and statutes involved are set forth in the Appendix to this petition. Their citations are set forth below:

Federal Rules of Civil Procedure, Rule 50 (b), 28 U.S.C. (Appendix to this petition, page 13a);

Federal Rules of Civil Procedure, Adopted Amendments, by order of United States Supreme Court dated January 21, 1963, Rule 50 (c) and (d); see February 1, 1963 issue of the Supreme Court Reporter and the February 11, 1963 issue of L. Ed. 2d. (Appendix to this petition, page 14a);

Title 28 U.S.C., Sec. 1652 (Appendix to this petition, page 15a);

Constitution of the United States, Seventh Amendment (Appendix to this petition, page 12a).

## STATEMENT OF THE CASE.

An appeal was taken to the United States Court of Appeals for the Seventh Circuit by the plaintiff following the second trial of a negligence personal injury action against a police officer. The jurisdiction of the Federal District Court of Illinois was invoked under Title 28 Sec. 1332, there being diversity of citizenship between the parties and the amount in controversy exceeding the jurisdictional requirements (App. Vol. 1, p. 11).

While driving at night in Crystal Lake, Illinois, plaintiff violated a traffic law. He then drove into a dark alley behind his hotel and defendant followed on his police department motor vehicle. While defendant was attempting to arrest plaintiff, the latter ran, fell in the alley and was injured, for which injuries this law suit was instigated.

The first trial was tried on both liability and damages. During the presentation of his case, plaintiff's attorney asked the plaintiff if he had any contact with the defendant police officer prior to the incident out of which the suit arose. Defendant's counsel objected, and the objection was sustained (App. Vol. 1, p. 22). Plaintiff's attorney made an offer of proof wherein he offered to prove by plaintiff that approximately four weeks prior to the incident in question, the defendant police officer had placed the plaintiff under arrest and that in the process, he dragged the plaintiff a distance of 100 feet. Also, that during the encounter, plaintiff's shirt was ripped from his back (App. Vol. 1, p. 124). This first trial resulted in a

$25,000 verdict for plaintiff, but defendant's motion for a new trial was allowed (App. Vol. 1, p. 24).

The second trial was tried on the issue of liability only. During the second trial, plaintiff's counsel made the same offer of proof referred to above that had been made at the first trial. This too, was excluded from the jury (App. Vol. 2, pp. 129-131). The jury returned a general verdict for plaintiff in the second trial.

Pursuant to Rule 50 (b) of the Federal Rules of Civil Procedure, defendant filed, in addition to a motion for judgment notwithstanding the verdict, an alternative motion for new trial. Different grounds were set forth for each motion. (App. Vol. 1, pp. 36-43).

The District Court granted defendant's motion for a judgment notwithstanding the verdict, but it did not act upon defendant's alternative motion for a new trial (App. Vol. 1, pp. 42, 43).

The plaintiff appealed and the Circuit Court of Appeals reversed the judgment notwithstanding the verdict, basing the reversal of the judgment on the "evidence" of the prior incident the previous month (being the offer of proof referred to heretofore) which was excluded at the trial.

In reversing the judgment notwithstanding the verdict, nothing was done as to defendant's undisposed alternative motion for a new trial on the issue of liability, which is still pending in the trial court. The cause was remanded on the issue of damages only (311 F. 2d 601, at p. 603).

Defendant filed a petition for rehearing, noting to the Court that in entering judgment for defendant notwithstanding the verdict, the District Court did not act upon

defendant's alternative motion for a new trial. The defendant set forth that his motion for a new trial is still pending in the District Court, and that the reversal of the judgment notwithstanding the verdict requires the remandment of the cause to the District Court to act upon the undisposed alternative motion for a new trial on liability. The petition for rehearing was denied in all respects (see appendix to this petition, p. 9a).

## REASONS FOR GRANTING THE WRIT.

### IN RELATION TO QUESTION ONE.

### A.

### THE CIRCUIT COURT OF APPEALS HAS DECIDED A QUESTION ARISING UNDER THE FEDERAL RULES OF CIVIL PROCEDURE IN CONFLICT WITH AN APPLICABLE DECISION OF THIS COURT AND FOUR DIFFERENT CIRCUIT COURTS OF APPEAL.

Pursuant to Rule 50 (b) of the Federal Rules of Civil Procedure, the defendant filed, in addition to a motion for judgment notwithstanding the verdict, an alternative motion for a new trial. In entering judgment for the defendant notwithstanding the verdict, the trial court did not rule upon the alternative motion for a new trial.

On appeal by the plaintiff, the Circuit Court of Appeals reversed the judgment notwithstanding the verdict but nothing was done, by way of remandment or otherwise, with respect to the undisposed alternative motion for a new trial.

In denying defendant's petition for rehearing, the Circuit Court of Appeals rejected defendant's contention that under such circumstances, where a judgment notwithstanding the verdict is reversed, the case should be remanded to the trial court to act upon the pending alternative motion for a new trial.

This precise question was passed upon by this Court in *Montgomery Ward & Co.* v. *Duncan*, 311 U.S. 243 (1940), 61 S. Ct. 189, 85 L. Ed. 147. On this very point, the Court said (311 U.S. 243) at page 255:

"In the circumstances, we think the failure of the District Court to rule in the alternative on both matters can be cured without depriving the defendant of opportunity to have its motion for a new trial heard and decided by the trial court, by modifying the judgment below to provide that the cause be remanded to the District Court to hear and rule upon that motion."

Not only is the Circuit Court of Appeals in the instant case in open conflict with the decision of this Court in *Montgomery Ward & Co.* v. *Duncan*, it is also contrary to applicable decisions of four other Circuit Courts of Appeal. In the Fourth, Fifth and Tenth Circuits, and also in the Circuit Court of Appeals for the District of Columbia, the Courts held that in the circumstances mentioned, where the judgment notwithstanding the verdict is reversed, the case should be remanded to the trial court to act upon the undisposed motion for a new trial:

**Fourth Circuit**, *Tribble* v. *Bruin*, 279 F. 2d 424 (South Carolina, 1960); *Hawkins* v. *Sims*, 137 F. 2d 66 (West Virginia 1943);

**Fifth Circuit**, *Banks* v. *Associated Indemnity Corporation*, 161 F. 2d 305 (Louisiana, 1947); *Atkins* v. *Halliburton Oil Well Cementing Co.*, 196, F. 2d 876 (Louisiana 1952); *Pruitt* v. *Hardware Dealers Fire Ins. Co.*, 112 F. 2d 140 (Georgia, 1940), decided before *Montgomery Ward & Co.* v. *Duncan*, 311 U.S. 244 (1940), 61 S. Ct. 189, 85 L. Ed. 147.

**Tenth Circuit**, *Rednauer* v. *Commercial Standard Insurance Company*, 253 F. 2d 907 (Oklahoma, 1958);

**District of Columbia**, *Casper* v. *Barber & Ross Company*, 288 F. 2d 379 (1961); *Pessagno* v. *Euclid Inv. Co.*, 112 F. 2d 577 (1940), decided while certiorari was pending

in *Montgomery Ward & Co.* v. *Duncan*, 311 U.S. 234 (1940), 61 S. Ct. 189, 85 L. Ed. 147.

In addition, in the Seventh Circuit itself, from which the instant case emanates, the Court on a prior occasion, under circumstances as are here present, held that the cause should be remanded to the trial court to act upon defendant's undisposed alternative motion for a new trial, *Vearn* v. *Crane*, 114 F. 2d 896 (Seventh Circuit Ill., 1940). The *Vearn* v. *Crane* case is especially interesting because in that case, the question as to what should be done with the undisposed motion for a new trial after the judgment notwithstanding the verdict was reversed, was raised for the first time in the petition for rehearing. On petition for rehearing, the Court held the case should be remanded to the trial court to rule on the alternative motion for a new trial.

In refusing to remand this cause to the trial court to rule upon the defendant's undisposed motion for a new trial, the Circuit Court of Appeals has violated an applicable decision of this Court arising under the Federal Rules of Civil Procedure; it has acted in conflict with the decisions of at least four other Circuit Courts of Appeal; and, moreover, it has not followed a prior decision of its own Circuit on the same question.

It is, therefore, necessary that a writ of certiorari be issued to determine whether this case, or any other case under similar circumstances, should be remanded to the District Court to act upon the undisposed motion for a new trial.

B.

**IF MONTGOMERY WARD & CO. v. DUNCAN IS NOT DISPOSITIVE OF THIS CASE, THEN AN OPINION BY THIS COURT IS NEEDED TO SETTLE AN IMPORTANT QUESTION UNDER THE FEDERAL RULES OF CIVIL PROCEDURE.**

In this respect, it is important to note that the recent amendments to Rule 50 ( (c) and (d) ) as adopted by Order of this Court dated January 21, 1963, do not in fact change or alter the existing procedure to be followed by the trial court. Amendments (c) and (d) to Rule 50 merely add to the Federal Rules of Civil Procedure, what this Court announced in *Montgomery Ward & Co.* v. *Duncan* (311 U.S. 243, see pages 253, 254).

Therefore, the same questions respecting Rule 50 that existed since *Montgomery Ward & Co.* v. *Duncan* and prior to amendments (c) and (d) to Rule 50, are still extant. It follows that the question presented in this case is extremely important to any civil action that is hereafter tried in a federal court where Rule 50 is employed.

Since *Montgomery Ward & Co.* v. *Duncan*, at least four different Circuit Courts of Appeal (see this petition, page 8) have been asked, "What if the trial court does not, *in fact*, rule upon the alternative motion for a new trial and a judgment notwithstanding the verdict is reversed?"

Citing, and solely relying upon *Montgomery Ward & Co.* v. *Duncan*, the Courts of Appeal for the Fourth, Fifth, and Tenth Circuits, and for the District of Columbia, have uniformly held that under such circumstances the cause is to be remanded to the trial court to rule upon the undisposed motion for a new trial (see cases cited, this petition, page 8).

If these decisions, which rely upon a holding of this Court, are not correct, then an Opinion by this Court is needed to settle this important question arising under the Federal Rules of Civil Procedure.

## IN RELATION TO QUESTION TWO.

### A.

### BY REVERSING A JUDGMENT IN A JURY CASE ON "EVIDENCE" NOT HEARD BY THE JURY, THE CIRCUIT COURT OF APPEALS HAS DEPRIVED THE DEFENDANT OF HIS CONSTITUTIONAL RIGHT TO A TRIAL BY JURY AS GUARANTEED BY THE CONSTITUTION OF THE UNITED STATES.

In reversing the judgment notwithstanding the verdict on "evidence" not heard by the jury, and not considered by the trial court, the Circuit Court of Appeals has encroached upon the defendant's right to a trial by jury as guaranteed by the Seventh Amendment to the Constitution of the United States, which provides:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

In reversing the judgment notwithstanding the verdict, but not remanding for a new trial on the issue of liability, the Circuit Court of Appeals concluded (311 F. 2d 601) at page 603:

> "We think the jury could on this evidence draw a reasonable inference that defendant should have foreseen, as a reasonably prudent man, that his conduct

> on the night in question, *in view of the incident the previous month*, would probably cause plaintiff, in fear for his safety, to leave the automobile, run away in the dark alley and be injured while running. This inference would support the finding of negligence." (Emphasis supplied)

The italicized part of the above quotation upon which the reversal of the judgment notwithstanding the verdict is based, was not admitted in evidence and was not heard by the jury. The Court makes this openly clear by employing a foot-note at page 602:

> "'The evidence of the prior incident was excluded at the trial. We think the ruling was erroneous because it has a bearing on plaintiff's mental state on the night of June 23. *Smith* v. *Cornell*, 59 Ill. 66 (1871), *Jennings* v. *Murphy*, 194 F. 2d 35, 37 (7th Cir. 1952), 2 *Jones, Evidence*, 1149 (2d ed. 1926), 18 *Illinois Law & Practice*, 193-94."

The reversal of the judgment notwithstanding the verdict based upon the Circuit Court of Appeals' own inference from "evidence" which was never heard by a jury constitutes an abridgement of the defendant's right to a trial by jury.

That the Circuit Court of Appeals' determination and inference of "evidence" not heard by a jury violates the Seventh Amendment to the Constitution of the United States is evident by what the Court said in *Slocum* v. *New York Life Ins. Co.*, 228 U.S. 364 (1912), 33 S. Ct. 523, 57 L. Ed. 879. In that case, where the Seventh Amendment was under consideration, quoting from another United States Supreme Court case, the Court said (228 U.S. 364) at page 378:

> "Its aim is not to preserve mere matters of form and procedure but substance of right. This requires

> that questions of fact in common law actions shall be settled by a jury, *and that the court shall not assume directly or indirectly to take from the jury itself such prerogative* * * *." (Emphasis supplied)

In this respect, it is interesting to note what the Supreme Court of Illinois has held with respect to a reviewing court considering "evidence" not submitted to a jury. In *Gundich* v. *Emerson-Comstock Co.*, 21 Ill. 2d 117 (1960), the Court held:

> "The Appellate Court also failed to realize that its determination of the ultimate facts in a jury case, *particularly from evidence not submitted to the jury*, would be an infringement of the jury function. (*Mirich* v. *Forschner Contracting Co.*, 312 Ill. 343.)" (Emphasis supplied)

In reversing the judgment notwithstanding the verdict on "evidence" not submitted to the jury, the Circuit Court of Appeals has not only infringed upon the jury function, it has, more importantly, deprived the defendant of his right to a trial by jury as guaranteed by the Seventh Amendment to the Constitution of the United States.

A writ of certiorari by this Court is necessary to protect the rights guaranteed the defendant by the Constitution of the United States.

B.

**THE OPINION OF THE CIRCUIT COURT OF APPEALS IS IN PATENT CONFLICT WITH APPLICABLE DECISIONS OF THE STATE SUPREME COURT ON AN IMPORTANT QUESTION UPON WHICH THE STATE SUPREME COURT HAS TWICE REVIEWED AND REVERSED ITS OWN APPELLATE COURT.**

The Circuit Court of Appeals reversed the judgment notwithstanding the verdict without remanding the cause

for a new trial on the issue of liability. The express circumstances under which this was done does violence to Title 28 U.S.C. Sec. 1652 on an important question which the Illinois Supreme Court has twice considered, and on each occasion has reversed its appellate court.

In *Gundich* v. *Emerson-Comstock Co.*, 21 Ill. 2d 117 (1960), (reversing 24 Ill. App. 2d 138), the Supreme Court of Illinois reversed the Appellate Court where a judgment notwithstanding the verdict was entered and held, on the issue here presented, at page 127:

> "We have indicated that the trial court rejected offers of proof on this issue made by the defendant. The Appellate Court found that such evidence was improperly excluded, and treated it as though it had been admitted, on the authority of language in two Appellate Court cases. (*Belorodker Loan & Investment Co.* v. *Goldenberg*, 253 Ill. App. 416; and *Gustin* v. *Bryden*, 205 Ill. App. 204.) The court apparently overlooked the case of *Dayton Scale Co.* v. *General Market House Co.*, 335 Ill. 342, decided by this court the same year as the *Belorodker* case, in which it was held that reversing without remanding on the basis of evidence improperly excluded by the trial court was error. The court in the *Dayton Scale Co.* case stated at p. 345: 'The evidence on which the Appellate Court based its judgment was not properly before that court and no opportunity had been given to the parties to introduce any and all evidence they might have on the point in dispute'."

Continuing, the Court said at page 128:

> "The Appellate Court also failed to realize that its determination of the ultimate facts in a jury case, particularly from evidence not even submitted to the jury, would be an infringement of the jury function (*Mirich* v. *Forschner Contracting Co.*, 312 Ill. 343). Moreover, the issue of the propriety of the admission or rejec-

tion of evidence is properly considered on a motion for a new trial, and not on a motion for judgment notwithstanding the verdict, which was involved herein. *Millikin Nat. Bank* v. *Shellabarger Grain Products Co.*, 389 Ill. 196, 200."

*Dayton Scale Co.* v. *General Market House Co.*, 335 Ill. 342 (1929) (reversing 248 Ill. App. 279) is another case where the Supreme Court of Illinois expressly and definitively held that where evidence is excluded by the trial court, if the exclusion is deemed improper by the reviewing court, that court may not reverse the judgment without remanding for a new trial. In that case, the Supreme Court of Illinois said at page 345:

> "When defendant in error offered in evidence the chattel mortgage and offered to prove the subsequent acts thereunder plaintiff in error objected, as it had a right to do. The trial court improperly sustained the objection. By this ruling the trial court excluded all evidence on the question whether or not plaintiff in error had precluded itself from denying the seller's authority to sell, which was the entire defense in the case. When the Appellate Court held that this evidence was improperly excluded it should have reversed the judgment and remanded the cause."

The Court then said:

> "If the evidence offered had been admitted by the trial court, plaintiff in error would then have had the right to offer any evidence in rebuttal which it might have had which tended to explain the alleged acts which it was claimed precluded it from recovering. When the objection was sustained all evidence on the main defense was not only excluded, but by the judgment of the Appellate Court plaintiff in error was barred of any right which it might have to recover. The evidence on which the Appellate Court based its judgment was not properly before that court and no

opportunity had been given to the parties to introduce any and all evidence they might have on the point in dispute."

The above holdings make it peremptorily clear that a reviewing court may not rule that evidence was improperly excluded from the jury by the trial court and then reverse the cause without remandment for trial, where the reviewing court's ruling is based on excluded evidence at the trial. Yet, this was precisely what the court below did in this case and its Opinion leaves no doubt about it.

If the Opinion of the court below is permitted to stand in its present form, there will exist an open repugnancy between it and the established law.

## CONCLUSION.

It is respectfully submitted that for the reasons assigned, this Court issue a writ of certiorari to the United States Court of Appeals for the Seventh District.

Respectfully submitted,

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(Appendix Follows)